United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1504

To be argued by
DAVID L. BIRCH

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MASIA A. MUK MUK, also known as SYLVESTER CHOLMONDELEY,

Plaintiff-Appellant,

-against-

COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES; J. EDWIN LaVALLEE, Superintendent of the Clinton Correctional Facility; VINCENT R. MANCUSI, Superintendent of the Attica Correctional Facility; JOHN L. ZELKER, Superintendent of the Green Haven Correctional Facility,

Defendants-Appellees.

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BRIEF FOR DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MASIA A. MUK MUK, also known as SYLVESTER CHOLMONDELEY,	:	
Plaintiff-Appellant,	:	
-against-	:	74-1504
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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff-appellant appeals from an order of the United States District Court for the Southern District of New York (Bonsal, J.), dated February 14, 1974, granting summary judgment to the defendants and denying plaintiff's motion for leave to add parties, to amend the complaint, and for summary judgment. The District Court's opinion is reported at 369 F. Supp. 245.

Questions Presented

1. Did the District Court correctly refuse to allow a third amendment to the complaint?

2. Was the segregation and keeplock of appellant constitutional and within the discretion of prison officials?

3. Are constitutional holdings concerning prison governance retroactive?

4. Are defendants entitled to a defense of good faith as a matter of law?

5. Can defendants be held liable on a theory of respondeat superior or a theory of vicarious liability?

Facts and Prior Proceedings

A. Appellant's Incarceration and Release

Appellant was convicted in the Queens County Court (Thompson, J.) on June 29, 1960, after a plea of guilty, of the crimes of rape in the first degree, burglary in the third degree and robbery in the third degree. He was sentenced to concurrent terms of 5 to 10 years on the burglary and robbery

convictions, which were to be served consecutively to a sentence of 10 to 20 years on the rape conviction. On June 12, 1972, the Appellate Division, Second Department directed that appellant's three sentences run concurrently.

At the time that appellant filed his second amended complaint, he expected to lose 1,915 days of good behavior time. He would then have been ineligible for conditional release until 1979. However, in May, June and early July of 1973, the Department of Correctional Services made a thorough review of appellant's record and, in an exercise of discretion, restored a sufficient amount of good time so that appellant was conditionally released on January 2, 1975.

B. Proceeding Below

This action was commenced on August 14, 1970, when appellant, through three attorneys (Herman Schwartz, Stanley A. Bass and Elizabeth M. Fisher) filed a 12 paragraph complaint dealing with three counts of allegedly improper prison discipline against appellant at Green Haven Correctional Facility during 1970.

On December 17, 1970, an amended complaint was filed dealing in greater detail with appellant's disciplinary infractions during 1970. The amended complaint was signed by the same three attorneys and, as did the first complaint, named as defendant only John L. Zelker, Warden of Green Haven Prison.

Appellant was permitted, on October 15, 1971, to file a second amended complaint. This document made a quantum leap from the modest dimensions of its two predecessors and purported, in 126 separate paragraphs, to challenge virtually every disciplinary action of appellant's prison record. The essential purpose of the complaint was to obtain the restoration of all the good behavior credits that appellant had lost. He also sought damages. It is this complaint that is the subject of this appeal. It, for the first time, names as defendants, in addition to Mr. Zelker, an unidentified Commissioner of the Department of Correctional Services, J. Edwin LaVallee, Superintendent of the Clinton Correctional Facility and Vincent R. Mancusi, Superintendent of the Attica Correctional Facility. Appellant was then represented by Elizabeth M. Fisher.

On November 23, 1971, the defendants' motion to dismiss for improper venue and on the ground that they were not

parties under the doctrine of respondeat superior was denied. The defendants made a motion to dismiss for failure to prosecute, returnable October 9, 1972. On the return date, plaintiff's attorney indicated that she was ready to proceed to trial, pending the discovery of certain documents believed to be in the possession of the Department of Correctional Services.

In a motion returnable October 23, 1973 and then adjourned to November 5, 1973, defendants moved for summary judgment. On October 30, 1973, appellant filed his motion for leave to add parties, to amend the complaint a third time and for summary judgment.

In a decision dated January 14, 1974 (and by order dated February 14, 1974), the District Court (Bonsal, J.), granted defendants' motion for summary judgment because insofar as appellant was seeking the restoration of good time credits, he was required to first exhaust his state remedies and insofar as he was seeking damages and an injunction, "correctional authorities have wide discretion in matters of internal prison administration and . . . reasonable action within the scope of this discretion does not violate a prisoner's constitutional

rights". 369 F. Supp. at 249.

The Court refused a third amended complaint stating at 362 F. Supp. at 250:

> "In view of the prior three complaints and the dilatory prosecution of this action by plaintiff, the court will not delay this action's disposition further by permitting another complaint to be filed."

A notice of appeal dated February 13, 1974 was filed on March 15, 1974. At this time appellant was represented by Elizabeth M. Fisher and an additional attorney, Jesse Berman. Appellant did not perfect his appeal by filing his brief and the joint appendix until on or about July 21, 1975, over sixteen months after the filing of the notice of appeal. On the appeal, appellant was represented again by Ms. Fisher and two new attorneys.

C. The allegations of the Complaint of October 15, 1971*

Appellant alleges that he was put in prolonged periods of segregation and keeplock from October, 1961, until January, 1970. He alleges that he was in segregation from October 3, 1961 until September, 1962, because in fear for the safety of a fellow Black Muslim, he chose segregation (Appellant's brief, pp. 7, 29). He admits he was given a choice of segregation or general population. Appellant was then at Auburn Correctional

* For an understanding of the complaint, the following information is necessary:

Date	Correctional Facility to which appellant was transferred.
7-7-60	Elmira Reception Center
9-20-60	Auburn
9-13-62	Clinton
2-20-65	Attica
3-31-66	Green Haven
2-11-67	Clinton
2-1-68	Auburn
5-2-69	Attica
2-7-70	Green Haven
12-29-70	Clinton
1-7-72	Green Haven

Defendant LaVallee was Superintendent of Clinton from November 26, 1958 until January 15, 1964 and from January 25, 1968 until the present; Defendant Mancusi was Superintendent of Attica Correctional Facility from September 23, 1965 until March 29, 1972. Defendant Zelker was Superintendent of Green Haven Correctional Facility from June 11, 1970 until March 29, 1972. See affidavit of David R. Spiegel, sworn to October 2, 1973, p. 2, submitted in support of defendants' motion for summary judgment.

Facility. No official from Auburn is named in the appellant's third complaint, filed October 15, 1971, the subject of this appeal.

Appellant next alleges a prolonged period of segregation from October 25, 1962 until February 20, 1965, essentially because Commissioner McGinnis had a policy of isolating Black Muslims (Appellant's brief, pp. 8-10, 20). He further alleges that he was not allowed to communicate with Elijah Muhamad or receive books or obtain the services of his ministers. Commissioner McGinnis is not specifically named as a defendant.

Appellant then alleges he was in segregation from March 16, 1965 until March 31, 1966 for writing some thoughts on a piece of paper (Appellant's brief, pp. 11, 30). He admits a disciplinary hearing and claims that he was not familiar with the rule prohibiting this, although he admits that there was such a rule. In fact, the disciplinary report, signed by a deputy warden, and a sergeant, indicates that appellant had stolen a quantity of wrapping paper, a quantity sufficient to form a bulge under his coat. (Exhibit "I" to this brief). Appellant was then at Attica. Defendant Mancusi, sued as Superintendent

of Attica did not begin as Superintendent at Attica until September 23, 1965, over six months after this incident.

Appellant alleges being placed in segregation for eleven days, January 31, 1967 to February 11, 1967 (Appellant's brief, pp. 11, 30) for possession of papers that were alleged to be anti-racial, anti-religious and that advocated the overthrow of the United States and for running a school for Muslims. In fact, the report made on January 31, 1967 (Exhibit "II" to this brief) demonstrates that appellant also claimed to be an organizer and terrorist and that he wanted to start a war and create bloodshed in the prison. Appellant was at that time at Green Haven. Defendant Zelker, named as Superintendent of Green Haven, did not become Superintendent there until over three years later.

Appellant next alleges that upon his arrival at Clinton on February 11, 1967, he had an interview with Deputy Warden DeLong, and that on the basis of that interview, he was placed in segregation until December 6, 1967 (Appellant's brief, pp. 12, 30). It is interesting to note that in his brief, at page 12, when he quotes from the affidavit in which Deputy Warden DeLong stated that appellant was "resentful, antagonistic

and flatly refused to cooperate" and "observe the rules and regulations of the institution", appellant conveniently deletes the phrase that indicate that he had received a copy of the rules and regulations that he refused to follow. Appellant also conveniently deleted the last paragraph of Deputy Warden DeLong's affidavit:

> "The religious beliefs of the petitioner have not been infringed upon and were not a factor in his assignment to segregation." (Exhibit "V" to Appellant's brief)

Deputy Warden DeLong is not named as a defendant in this action; neither is the individual who was warden of Clinton at that time.

Appellant's then challenges his transfer to Attica on May 2, 1969 and alleges that he was transferred from Auburn for advocating the establishment of a black studies program at Auburn. The Warden of Auburn at that time is not named as a defendant (Appellant's brief, pp. 12-13). At Attica, plaintiff alleges he refused to take the Stanford Achievement Test and that he refused to participate in the school program until he had taken the issue of his transfer to the courts. He alleges that he was keeplocked for thirty days at a time without radio

or commissary privileges from May 6, 1969 until January 28, 1970 for refusal to take the test (Appellant's brief, pp. 13-14, 30). He admits he was allowed a weekly shower and that he was provided a monthly disciplinary hearing (Appellant's brief, p. 14). Although he was keeplocked, he was in his own cell and appellant was not in segregation. Apparently, he was provided an opportunity each month to take the exam. During this period, appellant lost 10 days good time for throwing milk in a porter's face (Exhibit "III" to this brief).

Appellant's next series of allegations concerns what he entitles "debasing and dehumanizing conditions of confinement" (Appellant's brief, pp. 14-15).

The period from October 3, 1961 to November 2, 1961, was allegedly in a "strip cell", but appellant's complaints are that he was not allowed exercise, books, writing material or other personal effects and that his diet was reduced and had no cleaning material but rags (Appellant's brief, p. 14). He admits in the complaint (Par. 14, Joint Appendix, A-21) that he had a toilet, sink and a bed to which a mattress was added from 6:00 or 7:00 p.m. until 8:00 a.m.

He alléges that he was in the "dark hole" for two days in May, 1962 (Appellant's brief, p. 14). Later in his brief, at page 16, appellant refers to this incident again. There he states that he was put into this cell for throwing chop suey containing pork into the toilet. Appellant neglects to add that he had asked for the chop suey (Exhibit "IV" to this brief).

These two periods were while appellant was incarcerated at Auburn Correctional Facility. No official from Auburn is named as a defendant.

He then alleges that he was in E Block Segregation at Clinton from October 25, 1962 until April 12, 1963; that this was in the coldest part of the building; that the windows were regularly left open and that he did not have adequate winter clothing (Appellant's brief, p. 15).

He next alleges four periods in 1964 and 1965 when he was placed in Section 4 Segregation at Clinton (Appellant's brief, p. 15).

No named defendant was then working at Clinton. Similarly, he alleges that he was in a strip cell at Attica from March 16, 1965 until April 5, 1965 (Appellant's brief

page 15). Defendant Mancusi was not made Warden at Attica until September 23, 1965. His allegation with respect to having been in Section 4 Segregation at Clinton from February 11, 1967 until March 13, 1967, meets the same reply: defendant LaVallee was not the Warden at Clinton at that time.

Appellant next sets forth "other disciplinary action (Appellant's brief, pp. 15-18), which cover the period from March 21, 1962 until November 30, 1964, with one incident allegedly occuring in March, 1971. Although appellant keeps alluding to the complaint [of October 15, 1971], he does not state which defendant named in that complaint was allegedly responsible for his allegations. In fact, in March and May, 1962 (Appellant's brief, p. 16), appellant was at Auburn, but no one at Auburn was named as a defendant.

On July 23, 1964, plaintiff alleges he was found guilty of having destroyed a state issued toothbrugh and losing yard privileges for 30 days (Appellant's brief, p. 17). Appellant was then at Clinton, but defendant LaVallee was not. The same is true with respect to his allegation about losing commissary privileges for destroying prison stationery (Appellant's brief, pp. 17-18) and his allegation with respect

to being placed in segregation for insolence in handing over his eating utensl (Appellant's brief, p. 18).

On March 27, 1971, appellant's cell was searched and he alleges that he was charged with having inflammatory literature (Appellant's brief, p. 19). Appellant fails to state that he was also charged with "Possession of a code in order to transmit messages without censorship" (See Exhibit "V" to this brief.). He admits that he had a hearing and at that time was sentenced to time served (See Exhibit "VI" to this brief.).

POINT I

THE DISTRICT COURT CORRECTLY REFUSED TO ALLOW A THIRD AMENDMENT OF THE COMPLAINT.

As indicated above (pp. 3-5, supra), appellant's attorneys had filed three complaints between August 14, 1970 and November 5, 1973, the adjourned date of defendants' motion for summary judgment. Yet five days before the adjourned return date and one week after the original return date, appellant attempted to file a fourth complaint. The District Court correctly denied such request, stating, 369 F. Supp. at 250:

> "In view of the prior three complaints and the dilatory prosecution of this action by plaintiff, the court will not delay this action's disposition further by permitting another complaint to be filed."

It is well settled that permission to amend a pleading under Rule 15 of the Federal Rules of Civil Procedure lies within the discretion of the district court. The lower jurt's discretion is not subject to review except where it has abused its discretion. 3 Moore, Federal Practice ¶ 15.08 [4] (2d Ed. 1974); Zenith Radio Corp.v. Hazeltine Reserach, Inc., 401 U.S. 321, 330 (1971).

Although the District Court must allow amendment freely, its discretion will not be overturned where it has a valid ground for refusal. The fact that the proposed amendment was unduly delayed is a valid ground for such refusal. Foman v. Davis, 371 U.S. 178 (1962); Vine v. Beneficial Finance Co., 374 F. 2d 627 (2d Cir.) cert. den. 389 U.S. 970 (1967).

Where the plaintiffs had been given two opportunities to replead, this Court found that it was within the discretion of the District Court to deny leave to replead on a third attempt.

Mooney v. Vitole, 435 F. 2d 838 (2d Cir., 1970). No abuse of discretion was found where the first amendment to the complaint was sought three years after its filing. Wheeler v. West India S.S. Co., 205 F. 2d 354 (2d Cir., 1953); or where the amendment was offered more than four years after the commencement of the action, McHenry v. Ford Motor Co., 269 F. 2d 18 (6th Cir., 1959); or where the amendment to the complaint was sought eight months after the answer filed, Boris v. Moore, 253 F. 2d 523 (7th Cir., 1958).

The District Court surely did not abuse its discretion in refusing to allow the appellant to further amend his complaint, since he had been allowed to amend two previous times and since the amendment was offered one week after the first return date of defendants' motion to dismiss.*

* Appellant's dilatoriness in prosecuting this appeal (sixteen months from filing notice of appeal to filing of his brief and appendix) should also be considered with his dilatoriness below. Both immeasurably prejudiced the defendants - especially the additional defendants of the fourth proposed complaint who have never been served. Furthermore, now that he has been released, appellant's emphasis in this suit has gone from release to damages. In her affidavit, sworn to August 19, 1974, Elizabeth M. Fisher, appellant's attorney, submitted to this Court in support of an extension to perfect the appeal, stated: "Furthermore, there is a possibility that certain developments during September and October will moot this case".

POINT II

THE SEGREGATION AND KEEPLOCK OF APPELLANT WAS CONSTITUTIONAL AND WITHIN THE DISCRETION OF PRISON OFFICIALS.

Appellant alleges that five periods of segregated confinement and one of keeplock violated his constitutional rights. The first period occurred at Auburn. No official from Auburn, however, is named a defendant.

The second period is alleged to have occurred at Clinton, from October 25, 1962 until February 10, 1965. Defendant LaVallee was Warden at Clinton for only part of this period.

The third period, at Attica, commenced over nine months before defendant Mancusi became Warden. The fourth period, at Green Haven, was before defendant Zelker became Warden there. The fifth, at Clinton, occurred while defendant LaVallee was not Warden there.

In any event, appellant's allegations demonstrate that he was not placed in segregation lightly or without justification. He admits that the first time he requested that he

remain in segregation in a demonstration of solidarity with a fellow prisoner. He also essentially admits that he was acting with a number of other Black Buslims to upset the order of the prison.*

With respect to the incident at Clinton in October, 1962, appellant admits that he gathered with approximately 13 other Black Muslims and told the sergeant on duty in the yard that if two particular Muslims had broken rules, so had they (Appellant's brief, p. 9).

Appellant tries to compare his stealing paper from the textile shop with Robert Mosher's offense in Wright v. McMann, 460 F. 2d 126 (2d Cir.) cert. den. 409 U.S. 885 (1972). Mosher, however, was not involved in a theft of a quantity of material so great that it made his coat bulge (See pp.8 supra).

* This Court and several District Courts have acknowledged that the Black Muslim movement was legitimately considered a threat to prison order in the early to mid 1960s. See pp. 24-27, below.

As far as his confinement at Green Haven is concerned, appellant ignores the charge that he claimed to be an organizer and a terrorist desirous of starting war and creating bloodshed in the prison (Appellant's brief, p. 33; p.9, supra.).

At Attica, appellant was keeplocked, not placed in segregation, for refusing to take an achievement test. He was given a hearing every thirty days, so he obviously was given an opportunity each month to take the test. He refused each time.

In any event, this Court held in Sostre v. McGinnis, 442 F. 2d 178 (2d Cir., 1971) (en banc) cert. den. 404 U.S. 1049 and 405 U.S. 978 (1972) that it was not unconstitutional to place Martin Sostre in punitive segregation for twelve months and eight days notwithstanding the fact that he was let out only once a week to shower and one hour a day to exercise. Although an inmate cannot be placed in punitive segregation for expressing his political beliefs or for litigation, the court did not limit the use of punitive segregation in the future even where its term is indefinite.

In Wright v. McMann, 460 F. 2d 126, supra, this Court again recognized that there was no constitutional infirmity with the use of punitive segregation. At 460 F. 2d at 132, this Court stated:

> "Ordinarily we would be most reluctant to find unconstitutionally disproportionate the use of segregated confinement as punishment. Prison officials, not federal judges, are in day to day proximity or contact with the inmates and are consequently better able to determine what punishment might or might not be appropriate to a particular offense committed by a particular inmate. . . . In short, the inmate alleging disproportionate punishment will ordinarily have a heavy burden."

Robert Mosher met the burden, which appellant could not even if all the facts of his complaint were proved, because there, Warden McMann admitted that the punishment was inappropriate for the offense, an offense which had nothing to do with the agitation and disorder which appellant essentially admits he was part of.

In considering the authority of a Connecticut prison official, this Court stated in LaReau v. MacDougall, 473 F. 2d 974 (2d Cir., 1972) at 978 that:

> "[T]he determination of what punishment is effective and fair considering the nature of the offense and the character of the offender ordinarily whould be left to the informed judgment of prison authorities."

It is not believable that appellant's disciplinary record, called one of the worst in the history of the New York prison system, should have been merely because of a conspiracy to "get him" because of his political beliefs. It is inconceivable that every correction officer and every warden was determined to harass and punish appellant. As appellant's disciplinary record demonstrates (See the Joint Appendix, pp. A-72, ff.) appellant was continuously involved in infractions. It is not for the federal courts to now second guess, years later, whether each decision to punish appellant was proper.

POINT III

CONSTITUTIONAL HOLDINGS CONCERNING PRISON GOVERNANCE ARE NOT RETROACTIVE.

When the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974) established new standards of due process for determining when prisoners had violated prison rules or had so behaved as to warrant punitive segregation or loss of good time, it held that its ruling was prospective only and that it was not to apply to determinations made before the date of its decision. 418 U.S. at 573-74.

In Cox v. Cook, ___U.S. ___, 43 L. ed. 2d 587 (1975), the court made clear that before prison officials could be mulcted for damages for denying a prisoner his constitutional rights, there had to have been a judicial decision informing the official that he could not do something.

In Cox, the plaintiff-inmate alleged that he was placed in solitary confinement three times unconstitutionally. He requested money damages. A jury found that the inmate had been placed in solitary and had suffered mental damages. The Court of Appeals for the Fourth Circuit held that the prison

officials had been required by Landman v. Royster,* 333 F. Supp. 621 (E.D. Va., 1971) to provide an inmate with notice and hearing before being placed in solitary.

The Supreme Court, citing Pierson v. Ray, 386 U.S. 457 reversed the Fourth Circuit, since the inmate had been placed in solitary prior to Landman v. Royster, supra. Clearly, Cox stands for the proposition that where an inmate is treated unconstitutionally, he cannot sue prison officials for damages where what they did had not been held to be unconstitutional at the time.

Assuming arguendo (contrary to the facts) that appellant here alleges occurrences that are in fact unconstitutional now, which defendants do not admit, the history of prison litigation in this Circuit demonstrates that those actions were constitutional when they occurred.

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* Landman concerned itself not only with due process but the conditions of solitary confinement.

A. The Black Muslim Litigation

In Pierce v. LaVallee, 293 F. 2d 233 (2d Cir., 1961), this Court held that punishing an inmate solely because of his religious beliefs violates the Constitution. The court noticed that the Commissioner of Corrections had issued a directive on January 5, 1960, approving for purchase by an inmate the Koran.

On remand, the District Court, in Pierce v. LaVallee, 212 F. Supp. 865 (N.D.N.Y., 1962), affd. 319 F. 2d 844 (2d Cir., 1963), observed, 212 F. Supp. at 869:

> "Experience indicates that [Black Muslim] organization [at Clinton] is a likely formenting point for the unrest and frustration of confined inmates. It would seem to follow that the defendant [LaVallee] might well be derelict in his duty if he knowingly allowed such an organization to function. The segregation of the three plaintiffs who were apparently considered as some of the leaders in said organization would seem to be a proper, if not a necessary step in the insurance of discipline and good order within the prison."

It was just at this time that appellant, by his own admission, was participating in this organization.

Then, in Sostre v. McGinnis, 334 F. 2d 906 (2d Cir., 1964) cert. den. 379 U.S. 892 (1964), this Court held that the state prison officials "must be given an opportunity to propose workable rules for the administration of the rights claimed by these plaintiffs" (334 F. 2d at 907). Plaintiffs had alleged that they were denied the right to practice their religion and were being punished for that practice.

This Court, however, recognized that the activities of the Black Muslims were not exclusively religious and that religious values were of secondary importance to the Muslims' central doctrine of black supremacy and equation of the white race with "total evil". 334 F. 2d at 908, note 1. The court held that the constitutional protection of religion was "subject to extensive limitations" 334 F. 2d at 908; and that they were subject to "strict supervision and extensive limitations in a prison". 334 F. 2d at 908, and in particular at 911:

> "The particular characteristics of the Muslims obviously require that whatever rights may be granted because of the religious content of their practices must be carefully circumscribed by rules and regulations which will permit the authorities to maintain discipline in the prison."

The opinion is pervaded with the realization that prison officials have a right, and even a duty, to preserve prison discipline by curtailing the activities of the Black Muslims in New York prisons, including the prohibition of the display or even carrying of their literature. It cites numerous incidents, within New York prisons and prisons in California and the District of Columbia, where extensive trouble had occurred, instigated by the Muslim sect.

The court referred with approval to 62 Col. L. Rev. 1488, 1503-04 (1962), where it was stated:

> "Once the imminence of danger is apprehended and proved, it would seem preferable to give the Warden the discretion his competence warrants, and uphold all disciplinary measures reasonably necessary to meet the threatening situation. . . . The Black Muslim Koran, however, is the source of the anti-white doctrine that prompts many of the disciplinary problems, and Black Muslim services almost involve stirring expositions of the implications of the black supremacy doctrine -- words that may well pervade the behavior of those who attended for the rest of the day. . . . Thus, upon clear demonstration of the imminent and grave disciplinary threat of the Black Muslims as a group in a particular prison, prescription by prison officials of their activities seems constitutionally permitted."

The District Court was ordered to abstain while the state drew up regulations to allow freedom of religion within the guidelines of prison discipline.

The District Court, later, in SaMarion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y., 1966) required the Commissioner of Corrections to promulgate a set of rules and regulations to guide the practice of the Black Muslim religion. The court, however, stated at 253 F. Supp. at 741 that:

> "The Courts, of course, recognize the expertise of correction officials in the area of prison security and discipline and are prepared to give great weight to their judgments."

The court instructed that the Commissioner was permitted to restrict the practice of the religion to protect and preserve prison security, discipline or other legitimate prison interests.

It is just this type of activity, that this Court and the District Court recognized was a threat to discipline and culd be proscribed, that appellant admits he engaged in although he claims it was protected activity. Appellant claims that defendants were motivated by an anti-Muslim bias (e.g., Appellant's brief, p. 33), yet it was just such a vigilance that this Court realized was necessary in the 1960s, when the events which appellant now challenges occurred.

B. Strip Cell Confinement

It was not until this Court's first decision in Wright v. McMann, 387 F. 2d 519 (2d Cir.) on December 19, 1967, that a strip cell was held to constitute cruel and unusual punishment. And the cell described in Wright was considerably worse than anything appellant alleges. On remand, the District Court, at 321 F. Supp. 127, 135-36 (N.D.N.Y., 1970), noted that changes and improvements had taken place in the 4 Section of the Segregation Unit at Clinton; that Wright testified that conditions had vastly improved; and that LaVallee had testified that the dark cells were no longer used.

In affirming and reversing the District Court, this Court noted in Wright v. McMann, 460 F. 2d 126 (2d Cir.) cert. den. 409 U.S. 885 (1972) at 131:

> "[N]ew York has on its own motion acted to remedy perceived deficiencies in treatment of inmates in general as well as those confined to segregation or psychiatric observation cells."

The court further noted that the New York Correction Law was amended in 1970 requiring that inmates be provided with suitable clothing, nutritious food, and that segregation cells were to be

sanitary. New rules relating to standards for segregation cells were also promulgated.

Again, in LaReau v. MacDougall,473 F. 2d 974 (2d Cir., 1972) this Court found that the strip cell used in Connecticut was below the irreducable minimum of decency required by the Eighth Amendment. The Connecticut inmate, however, was kept almost in total darkness and total silence with a hole in the floor as a toilet.

Interestingly, between this Court's two opinions in Wright v. McMann, it indicated in Corby v. Conboy, 457 F. 2d 251 (2d Cir., 1972), that claims of "insufficient warm clothing, inadequate diet, poor lighting, lack of personal hygiene supplies and hot water; harassment and discipline for refusal to accept employment" do not state a claim for relief.

It is clear from the Wright series that as soon as New York State prison officials were made aware by the Courts that strip cell confinement was constitutionally defective that all segregation units were upgraded. All of appellant's alleged confinements occurred prior to this Court's first opinion in Wright,(See Appellant's brief, pp. 14-15). As unpleasant as

these conditions might appear, in hindsight, when appellant was allegedly so confined no New York prison official had been ordered to provide otherwise. To hold any prison official liable now (assuming even that these defendants were at the institutions where appellant was incarcerated and are otherwise responsible (see pp.7-14 infra) would violate the holding of the Supreme Court in Cox v. Cook, supra.

C. Segregation and Due Process

When this Court decided Sostre v. McGinnis, 442 F. 2d 178, supra, it noted, at 181, that the question presented in the case, the federal constitutional rights of state prisoners, had not been answered by Supreme Court precedent or by the past decisions of this Court. Until Sostre, neither the process due a prisoner nor the extent of permissible segregation confinement has been presented to or decided by the courts of this Circuit.

In fact, two years before Sostre, this Court stated in Menechino v. Oswald, 430 F. 2d 403, 412 (2d Cir., 1970), in holding that an inmate had no rights to procural due process when being considered for parole release, that the Parole Board's

determination is an "aspect of state prison discipline" and that federal judiciary would not undertake the supervision of prison disciplinary procedures.

Sostre, thus, was the first time that this Court held minimal due process standards to apply to prison disciplinary proceedings.

Essentially all of appellant's allegations about segregation and even loss of good time occurred before this Court's decision in Sostre. The one time appellant complains of an occurrence after Sostre (Appellant's brief, p. 18; Complaint, Par. 115), he admits having had a hearing at which he was sentenced to the few days that he had already served.

The objective of the due process safeguards required in Sostre was that prison officials not act to impose serious discipline on an inmate until the facts were objectively determined to have occurred. The substantive decision about punishment is, in almost all instances, within the unfettered discretion of the state officials. Even after Sostre and Wolff v. McDonnell, supra, that decision must be made within the expertise of the prison officials.

It cannot be gainsaid that had the requirements of Sostre been in effect at the times about which appellant now complains that his punishment might possibly have been different. But the Supreme Court in Cox v. Cook, has foreclosed that inquiry, especially where the inmate seeks monetary damages.*

POINT IV

DEFENDANTS ARE ENTITLED TO A DEFENSE OF GOOD FAITH AS A MATTER OF LAW.

It is clear from the discussion above that even if appellant's allegations are true, no prison official is alleged to have done anything at a time when a particular act had already been held unconstitutional.

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* This Court speculated about the problems of pre-Sostre determinations in Williams v. Vincent, 508 F. 2d 541 (2d Cir., 1974) Note 10 where it indicated that it thought the non-retroactivity rule of Wolff v. McDonnell not applicable where the incident did not have the benefit of Sostre procedures. That reasoning has been foreclosed by Cox v. Cook, supra, which was decided after Williams.

The elements of the good faith defense to a /it for damages for a violation of civil rights has been set forth by this Court in LaVerne v. Corning, ___ F. 2d ___, Slip. Op. No. 419, Docket No. 74-1856, p. 4617 (2d Cir., 1975).

The defendant must act in the belief that the act complained of was lawful and the belief must be a reasonable one in light of the circumstances. Accord, Wood v. Strickland, ___ U.S. ___, 43 L. Ed. 2d 214 (1975); Scheur v. Rhodes, 416 U.S. 232 (1974). There is no question that the defense is applicable to prison officials, Cox v. Cook, supra.

In LaVerne v. Corning, supra, the court found that court decisions extant at the time of the act complained of, local ordinances, advice from the village attorney and the defendants' duty to enforce the law provided sufficient evidence that the defendants' belief that the act complained of (search of plaintiff's property without a warrant) was constitutional and was reasonable.

This Court repeated the wisdom of Pierson v. Ray, 386 U.S. 547 (1967) that state officials are not to be charged with predicting the future course of constitutional law.

This case, however, is unlike LaVerne, Wood v. Strickland, supra or Scheur v. Rhodes, supra, where the subjective beliefs of the defendants were unknown without taking of testimony. The New York prison system has been the subject of judicial scrutiny for well over a decade. At no time when new constitutional standards were enunciated by this Court or the District Courts did any court find that any prison official had acted in bad faith. The Department of Correctional Services was often commended for being responsive to new rulings, Cf. Wright v. McMann, 321 F. Supp. 127, supra; Wright v. McMann, 460 F. 2d 126, 131, supra. There can be no doubt that New York's prison officials instituted constitutional requirements as they became known. They cannot be charged with predicting the future course of constitutional law.

POINT V

DEFENDANTS CANNOT BE HELD LIABLE ON A THEORY OF RESPONDEAT SUPERIOR OR A THEORY OF VICARIOUS LIABILITY.

It is now settled that before an individual can be held liable for monetary damages under 42 U.S.C. § 1983, that there must be some showing of personal responsibility of the defendant and that in the case of defendant officials, the

doctrine of respondeat superior does not apply. Williamsv. Vincent, 508 F. 2d 541, supra; Johnson v. Glick, 481 F. 2d 1038 (2d Cir., 1973) cert. den. 414 U.S. 1033 (1973); Martinez v. Mancusi, 443 F. 2d 921 (2d Cir., 1970).

It must be remembered that appellant was always represented by counsel, and in fact, often by three counsel. Yet, if the complaint is read as it must be (Joint Appendix, pp. A-19 ff), rather than the assertions in the appellate brief seeking to expand what he alleged, appellant has never alleged that the defendants he named did anything in particular or that they were responsible for the asserted conduct of their subordinates. Yet, it is almost always those subordinates who allegedly did something to plaintiff. Accordingly, even if the common law tort standard making one liable for the natural consequences of his action is applied, there is no case presented and the complaint was properly dismissed.

Appellant never even alleged when the defendants were in charge of the particular institutions they served; nor does he give any reasons why those particular Wardens were chosen and not the Wardens of the other institutions at which he was

incarcerated. In short, appellant grabbed a few names (he even failed to name the Commissioner he was suing), and attempted to hold them liable for everything that had happened to him in twelve years of incarceration regardless of whether the defendant had even been in the employ of the State at the time. Defendants and the court were entitled to insist on more specificity. Defendants are entitled to be free from liability for actions not even alleged to have been committed by them.

In sum, appellant is attempting by the use of current constitutional standards to hold defendants liable for events that occurred significantly before those standards were enunciated. Although he has had six attorneys at his service, he has allowed years to pass, both in the District Court, and in perfecting this appeal, as defendants' witnesses disappear and their memories of the events alleged, by necessity, become mixed with the memories of thousands of other inmates. His dilatoriness itself is sufficient to support the order of the District Court denying him all relief.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
October 14, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellees

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID L. BIRCH
Deputy Assistant Attorney General
of Counsel

APPENDIX

EXHIBIT I

1-26 4 64 2M

STATE OF NEW YORK — DEPARTMENT OF CORRECTION

ATTICA PRISON

DISCIPLINARY ACTION

March 16, 1965

THE WARDEN

I hereby report Chdmondeley.

No. 20738 Cell 22/10 Shop Textile

for taking wrapping paper and

[illegible] the textile shop without

permission and for insolence

to a Corr. Sgt.

Tonite when the shops run out

(Signed) over →

Case heard March 17 1965 on his

Plea of guilty

JUDGEMENT

Fined 30 days + Seg.

Extremely insolent during

the hearing.

Remarks:

A.J. Meyer

Deputy Warden

This form must be filled out by officer reporting the infraction and after judgement filed in the Inmates Central Record file.

DP

EXHIBIT I (continued)

at the time [illegible]
this inmate had a bulge under
his coat. I frisked him and
found he had a quantity of brown
wrapping paper he had taken from
the shop.

While I was questioning him
he was very insolent.

Respectfully submitted
D. C. Henry Corr. Sgt.

GHP 1 26MD 5 66.

EXHIBIT II

STATE OF NEW YORK - DEPARTMENT OF CORRECTION

GREEN HAVEN PRISON

DISCIPLINARY ACTION

Jan 31 19 67

THE WARDEN:

THE SUPERINTENDENT:

I hereby report CHAL MONDELEY

No. 11623 Cell F-4-130 Shop 13²

for ANTI-RACIAL-ANTI-RELIGIOUS PAPERS ALSO ADVOCATING OVERTHROW OF U.S. GOVERMENT. ALSO RUNNING SCHOOL FOR MUSLIMS, THE ATTACHED PAPERS WERE FOUND HIDDEN UNDERNEATH THE ABOVE INMATES LOCKER.

(Signed) R Kuss C.O.

Case heard Feb 1 19 67 on his plea of Guilty guilty.

JUDGMENT

Segregation -

Remarks:

B/L

Deputy Warden Ass't. Deputy Warden

This form must be filled out by the officer reporting infraction and after judgement filed in the Inmates Central File.

EXHIBIT II
(continued)

had in his possession the attached paper which says he is an organizer and terrorists. He wants to start war and ~~created~~ create bloodshed in the prison.

R Hess

EXHIBIT III

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

Attica State Prison
(Name of Institution)

DISCIPLINARY ACTION

12-24-1969

THE SUPERINTENDENT
THE WARDEN

I hereby report SYLVESTER CHOLMONSLEY
No. 20738 Cell EAST-25 Shop REGT-B
for At this morning feed up, Cholmondley wanted extra food and when the Doctor refused to give it to him. He became abusive and threw milk in the Doctors face.

(Signed) E Klein

Case heard 12-24 1969 on his
plea of _____ guilty.

JUDGEMENT

10 Days L.T.

Remarks:

H W Benedict
Act. Deputy Warden

Asst. Superintendent

This form must be filled out by the officer reporting the infraction and after judgement filed in the inmate's Central file.

EXHIBIT IV

ss form 1-20 AUBURN PRISON

DISCIPLINARY ACTION

DATE: 5/19/62

The Warden:
The Superintendent:

I hereby report Cholmondeley

No. 56095 Cell K-1 Shop Segregation

for Throwing plate food in toilet. This man asked for and was given a full bowl of Chop Suey. He then turned and threw it in the toilet.

(Signed) C. Cholmondeley

Case heard 5-26 1962

on his plea of ——— guilty.

JUDGEMENT

14 DAYS

&

30 DAYS ✓

Remarks: PUT IN SEG-A SEC 5-24-62
RELEASED 5-26-62

J. P. Regan

Principal Keeper Asst. Superintendent

This form must be filled out by officer giving Judgement, filed in Inmates Central Rec. File.

EXHIBIT V

State of New York - Department of Correction

CLINTON CORRECTION FACILITY
Facility

SUPERINTENDENT'S PROCEEDING

FORMAL CHARGE

To: CHOLMONDELEY, Sylvester No. 33034 Cell K-12/37

You are hereby notified that the Superintendent has directed that a formal charge be filed against you to be considered and determined at a Superintendent's proceeding to be held on APRIL 2, 1971 (date) before P.J. DE LONG, DEPUTY SUPERINTENDENT (name and title) for the following misbehavior:

1 - For having, in his possession, literature of revolutionaryand inflamatory nature, without a satisfactory explanation for having same.

(Note) This material consisted of the following:
  1- Twelve point platform of the Black Demands in Prison.
  2- Definitions, goals, and methods of operations of several Black Movement organizations.

2 - Possession of a code in order to transmit messages without censorship.

You are further notified that J. Boisseau, Correction Officer (name and title) has been designated to furnish assistance to you in this matter.

Signature of Person Preparing Charge | LIEUT. Title | MARCH 30, 1971

ONLY COPY AVAILABLE

EXHIBIT VI

Form 253-B

State of New York — Department of Correction

CLINTON CORRECTIONAL FACILITY
(Facility)

SUPERINTENDENT'S PROCEEDING
RECORD SHEET

1) Name of Inmate [illegible], [illegible] No. [illegible] Cell [illegible]

2) Date Charge Made March 30, 1971 Date of Inmate's First Interview APRIL 2, 1971

3) Inmate ☐ Admits Charge ☒ Denies Charge ☐ Admits acceptable variation of charge

(specify) Inmate stated that he did not consider the literature to be revolutionary or inflamatory.

Signature of Inmate ____________ No. ____________

4) Witnesses Interviewed

Name	Title	Name	Title

5) Reports Considered Misbehavior report dated March 27, 1971 by C.O. R. [illegible] as well as past disciplinary [illegible].

6) Second Interview, Inmate ☐ Admits Charge ☐ Denies Charge ☐ Admits acceptable variation of charge

7) Charge ☐ Affirmed ☐ Dismissed ☐ Varied and affirmed as follows

8) Action by adjustment committee to date on this matter (enter cumulative confinement and loss of privileges)

Inmate has been confined to his cell since 3-27-71 pending Superintendent's Proceedings

9) Disposition Ordered Sentenced to time already served.

23

[signature] — Signature
DEP. SUPERINTENDENT — Title
April 2, 1971 — Date

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 14th day of October , 1975 , She served the annexed upon the following named person :

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, ESQS.
345 Park Avenue
New York, New York 10022

DAVID J. FINE
ELIZABETH M. FISHER
DAVID ROSENBERG,
of counsel

Attorneys in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address es within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
14th day of October , 1975

Deputy David Y. Birch
Assistant Attorney General
of the State of New York